

1 LAURA E. DUFFY
2 United States Attorney
3 DANIEL E. BUTCHER
4 Assistant U.S. Attorney
5 California Bar No. 144624
6 Office of the U.S. Attorney
7 880 Front Street, Room 6293
8 San Diego, CA 92101
9 Tel: (619) 546-7696
10 Fax: (619) 546-7751
11 Email: Daniel.Butcher@usdoj.gov

12 Attorneys for the United States

13
14 UNITED STATES DISTRICT COURT
15 SOUTHERN DISTRICT OF CALIFORNIA

16 LYCURGAN INC. dba ARES ARMOR,

17 Plaintiff

18 v.

19 B. TODD JONES, in his official capacity
20 as Head of the San Diego Bureau of
21 Alcohol, Tobacco, Firearms and
22 Explosives; and DOES 1-10,

23 Defendants.

24 Case No.: 14CV1679 JLS (BGS)

25 DEFENDANT'S REPLY TO
26 PLAINTIFF'S OPPOSITION TO
27 MOTION TO DISMISS AMENDED
28 COMPLAINT

DATE: January 7, 2016
TIME: 1:30 p.m.

Hon. Janis L. Sammartino

19 I

20
21 INTRODUCTION

22 Subsequent to the filing of ATF's motion to dismiss, the Ninth Circuit
23 dismissed Plaintiff's appeal. That dismissal moots the first argument in ATF's motion
24 to dismiss and permits this Court to rule on the viability of Plaintiff's "Verified
25 Petition for Return of Property" (ECF #34).

26 But, as further argued in ATF's motion to dismiss, Plaintiff's Petition is not
27 viable. To the contrary, the relief sought by Plaintiff's Petition (i.e. an order directing
28 ATF to return the EP80 lower receivers seized from Plaintiff) is moot because ATF is

1 not asserting any legal right to retain the EP80s and has agreed and endeavored to
2 return them. If, as Plaintiff claims, 18 of the approximately 5,800 EP80s seized from
3 Plaintiff were lost, stolen, miscounted, or are otherwise unaccounted for, then that is a
4 question of whether ATF is liable to Plaintiff in damages, which is beyond the scope
5 of Plaintiff's Petition for equitable relief. The Court therefore should dismiss
6 Plaintiff's Petition because the relief it seeks – an order directing the return of the
7 EP80s – is moot.

III

ARGUMENT

A. The Ninth Circuit’s Dismissal of Plaintiff’s Appeal Returned Jurisdiction to this Court

Subsequent to the filing of ATF's motion to dismiss, the Ninth Circuit dismissed Plaintiff's appeal. Jurisdiction over this case was then returned to this Court. ATF agrees that the first argument in ATF's motion to dismiss is moot.

B. Plaintiff's Claim that CAFRA and Fed. R. Crim. P. 41 Require ATF to Return the EP80s is Moot Because ATF is Not Asserting any Right to Retain Them and has Agreed to Return all EP80s in its Possession

Plaintiff’s Petition seeks an injunction “command[ing] Defendant to release the 18 unreturned [EP80s] forthwith and without delay.” ECF # 34 at 10. But ATF is not asserting any right to continue to hold any EP80s, and has agreed and endeavored to return all in its possession to Plaintiff. See Declaration of Resident Agent in Charge Armando Hernandez (ECF #39-2) at ¶¶ 6, 7. Where, as here, the requested equitable relief seeks the identical action that a defendant has agreed to perform (e.g., return all property in its possession), the case is moot. See, e.g., Tellez-Sanchez v. United States, 2014 WL 3339800, *3 (D. Az. 2014) (“Because Defendant attests that the subject property is no longer in its possession, the Court is unable to order the return of property and, to the extent the motion seeks an order requiring Defendant to provide the [property] to Plaintiff, the motion is moot.”); United States v. Cornelie-

1 Reyes, 2008 WL 1767057, *1 (D. Nev. 2008) (“The Court denied Defendant’s motion
 2 for return of seized property as moot because the Government indicated that it would
 3 instruct for the money to be released upon receipt of the name and address for the
 4 designated recipient for the money.”).

5 Although Plaintiff points out (correctly) that the number of EP80s that ATF
 6 returned to Plaintiff (5,786) is not the same number reflected on the inventory from
 7 the seizure (5,804), see Opp. at 1, that is not because ATF is asserting a right to retain
 8 any EP80s (it is not). And a dispute over lost, stolen, misappropriated, destroyed, or
 9 otherwise unaccounted for seized property does not create a live case or controversy
 10 over Plaintiff’s entitlement to an order directing the property when that issue is not in
 11 dispute. See Tellez-Sanchez, 2014 WL 33380, *3; In re National Mass Media
 12 Telecomm. Sys., 152 F.3d 1178, 1180 (9th Cir. 1988) (sale of debtor’s property to a
 13 non-party renders claim moot if debtor seeks only return of his property); United
 14 States v. White, 718 F.2d 260, 261 (8th Cir.1983) (“since the government does not
 15 possess White’s property, it cannot return his property, and the motion was properly
 16 denied”). Cf. Ordonez v. United States, 680 F.3d 1135, 1137-39 (9th Cir. 2012)
 17 (considering only whether money damages were available under Fed. R. Crim. P.
 18 41(g) where “the subject property was lost or destroyed”) (Sammartino, J., sitting by
 19 designation).

20 The 18 EP80 discrepancy presents, at most, a question of ATF’s liability in
 21 damages (depending on whether the EP80s were lost, stolen, or simply miscounted).
 22 But Plaintiff’s Petition does not seek damages, and, moreover, any claim for damages
 23 against ATF must generally be brought, in the first instance, as an administrative
 24 claim. See 28 U.S.C. § 2675(a) (“An action shall not be instituted upon a claim
 25 against the United States for money damages for injury or loss of property . . . caused
 26 by the negligent or wrongful act or omission of any employee of the Government . . .
 27 unless the claimant shall have first presented the claim to the appropriate Federal
 28

1 agency"); Ordonez, 680 F.3d at 1138-39 (agreeing with "[e]ight other circuits ...
 2 that sovereign immunity bars an award of money damages against the government on
 3 a Rule 41(g) motion where property cannot be returned.").

4 C. Plaintiff's Procedural Objections to ATF's Motion Are Without Merit

5 Attempting to forestall a mootness-based dismissal, Plaintiff claims that ATF's
 6 motion "is more properly viewed as a motion for failure to state a claim under Rule
 7 12(b)(6)," not Rule 12(b)(1). Opp. at 2. Plaintiff is incorrect. See, e.g., White v. Lee,
 8 227 F.3d 1214, 1242 (9th Cir. 2000) ("Because standing and mootness both pertain to
 9 a federal court's subject-matter jurisdiction under Article III, they are properly raised
 10 in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)"). And, unlike
 11 a 12(b)(6) motion, the Court may consider extrinsic evidence in resolving a 12(b)(1)
 12 motion. Id.

13 Plaintiff further attempts to delay a dismissal on mootness grounds by citing In
 14 re Wilshire Courtyard, 729 F.3d 1279, 1284 n. 4, and Safe Air for Everyone v. Meyer,
 15 373 F.3d 1035, 1039 (9th Cir. 2004) for the proposition that "[W]hen the question of
 16 jurisdiction and the merits of the action are intertwined, dismissal for lack of
 17 jurisdiction is improper." Opp. at 2. But the very next sentence in Safe Air defines
 18 when such intertwining is present: "The question of jurisdiction and the merits of an
 19 action are intertwined where a statute provides the bases for both the subject matter
 20 jurisdiction of the federal court and the plaintiff's substantive claim for relief." 373
 21 F.3d at 1039 (internal quotation omitted).

22 No such statutory intertwining is typically present when the issue is one of
 23 mootness, which is not rooted in any statute. And, consistent with this result,
 24 mootness was not the basis for the jurisdictional challenge in either In re Wilshire
 25 Courtyard or Safe Air.

26 The jurisdictional issue in Safe Air concerned whether grass residue was a
 27 "solid waste" regulated by the Resource Conservation and Recovery Act (RCRA). Id.
 28

1 at 1037. If so, then the federal court had jurisdiction under RCRA and the statute was
 2 violated. Id. at 1037-40. If not, then RCRA did not cover the challenged conduct and
 3 (according to defendant) the federal court lacked subject matter jurisdiction over the
 4 case. The Ninth Circuit held that, in this situation, where the jurisdictional and
 5 statutory issues were the same, the issue is properly resolved on the merits rather than
 6 in a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). Id. at 1040.

7 The jurisdictional issue in In re Wishile Courtyard concerned whether a
 8 bankruptcy court had jurisdiction to reopen a closed case to rule on the tax
 9 consequences of the bankruptcy reorganization. Id. at 1282-83. The Ninth Circuit
 10 held that the jurisdictional and merits questions were intertwined because both
 11 “involve[d] difficult questions about overlapping state tax and federal bankruptcy
 12 laws” that “rest[ed] on the need to interpret the Plan and Confirmation Order to
 13 resolve the merits questions.” Id. at 1284.

14 Unlike the disputes over federal subject matter jurisdiction in In re Wilshire
 15 Courtyard and Safe Air, the jurisdictional issue here is one of mootness (i.e., whether
 16 Plaintiff’s request for an order directing ATF to return the EP80s is moot because
 17 ATF has agreed and endeavored to return them), which does not implicate the merits
 18 of the case (i.e., whether CAFRA or Fed. R. Crim. P. 41(g) would require the return of
 19 the EP80s if ATF were asserting a right to retain them). Because ATF is not asserting
 20 any right to retain any EP80s, there is no reason for the Court to issue an advisory
 21 opinion over whether ATF could keep any of the EP80s if, hypothetically, it was
 22 asserting a right to do so. If Plaintiff were to prevail and obtain the equitable relief
 23 sought in its “Verified Petition for Return of Property,” the judgment would say
 24 exactly what ATF has already agreed and endeavored to do: return all EP80s in its
 25 possession. For this reason, the equitable relief sought in Plaintiff’s Petition is moot.
 26 See generally Already, LLC v. Nike, Inc., 133 S. Ct. 721, 727 (2013) (“the case is
 27
 28

1 moot if the dispute is no longer embedded in any actual controversy about the
 2 plaintiffs' particular legal rights.”).

3 D. The Court Should Dismiss Plaintiff's CAFRA Claim for Relief

4 As discussed in ATF's opening brief (pp. 8-9), the CAFRA allegations in
 5 Plaintiff's Verified Petition are virtually identical to those in Plaintiff's original
 6 complaint, which this Court has twice dismissed. Plaintiff attempts to overcome the
 7 Court's prior orders by attempting to distinguish In re Matthews, 395 F.3d 477 (4th
 8 Cir. 2005), which the Court found persuasive in its initial dismissal order. Compare
 9 Opp. at 7-8, with Order Granting Defendant's Motion to Dismiss (ECF #19) at 6.
 10 Specifically, Plaintiff argues that CAFRA applies (and compels return of the EP80s)
 11 because it is bringing the CAFRA claim after the United States has elected not to file a
 12 civil forfeiture action. Opp. at 7-8. But those same circumstances were present when
 13 Plaintiff filed its initial CAFRA complaint, and, therefore, provide no basis for
 14 departing from the law of this case. See School Dist. No. 1J, Multnomah County v.
 15 ACandS, Inc., 5 F.3d 1255, 1262-63 (9th Cir. 1993) (“Reconsideration is appropriate
 16 if the district court (1) is presented with newly discovered evidence, (2) committed
 17 clear error or if the initial decision was manifestly unjust, or (3) if there is an
 18 intervening change in controlling law.”).

19 On the merits, and as this Court has twice ruled, CAFRA does not apply
 20 because ATF seized the EP80s pursuant to a criminal search warrant and (until they
 21 were returned) held them as evidence in connection with a criminal investigation. See
 22 Order Denying Motion for New Trial (ECF #33) at 4 (“the Court's order on the
 23 motion to dismiss makes clear that the Court did not base its decision on whether the
 24 seized items would be returned. Rather, the Court found that because the ATF
 25 voluntarily dismissed its forfeiture action, the Court's jurisdiction over the forfeiture
 26 action was divested.”). Accord Celata v. United States, 334 Fed. Appx. 801, 802 (9th
 27 Cir. 2009) (unpublished) (CAFRA does not provide a jurisdictional basis to compel
 28

1 government to return property seized pursuant to a validly executed search warrant).
2 Nothing in In re Matthews is to the contrary, as this Court ruled the first time it
3 dismissed Plaintiff's CAFRA claim. See Order Granting Defendant's Motion to
4 Dismiss (ECF #19) at 6 ("the Court finds persuasive the principle announced in *In re*
5 *Matthews*, that when the government voluntarily dismisses a forfeiture action the
6 district court's jurisdiction over the forfeiture action is divested. This principle
7 applies regardless of whether the case is voluntarily terminated before or after the
8 filing of a forfeiture complaint.").

III

CONCLUSION

For the foregoing reasons, the Court should grant the ATF's motion to dismiss.

DATED: December 17, 2015

Respectfully submitted,

LAURA E. DUFFY
United States Attorney

s/ Daniel E. Butcher
DANIEL E. BUTCHER
Assistant United States Attorney
Attorneys for Defendant